

YEE SIN CHEONG

v.

UNITED MALAYAN BANKING CORP. BHD.

HIGH COURT MALAYA, Kuantan

Lamin Mohd. Yunus J

[Suit No. 453 of 1985]

10 February 1992

BANKING: *Financing - Whether there was a contractual agreement for the defendant to retain the land title - No loan transaction - Entire arrangement to assist ex-employee - Whether sham - Undue influence - Inequality of bargaining - Whether evidence of bank manager and solicitor colluding - Plaintiff not allowed to take independent legal advice, s. 26A of Bankruptcy Act 1973, s. 24 of Contracts Act 1950.*

The plaintiff (PW1) is claiming for the return of the issue document of title to her land held under H.S (M) 5653 P.T. 5733 Mukim Kuala Kuantan which is alleged to have been wrongfully detained by the defendant bank.

According to PW2, he was employed by the defendant in 1974 as an assistant cashier cum clerk at the Kuantan Branch of the bank. On 16 May 1983, PW2 signed a letter (PD-01) addressed to the manager (DW1) of the defendant's branch in Kuantan.

In evidence, it was said that the letter was written by DW2 and he (PW2) then, on the advice of DW2 typed it after which he signed it. In the letter he confessed to have paid out on two telegraphic transfers RM50,000 each which were "not genuinely authorised by that relevant officer of the bank". The latter also states that the "total sum of RM100,000 was paid by PW2 as a result of his own personal negligence", and he "agrees and undertakes to refund to the Bank" the whole amount. The letter goes on to state that as PW2 was then "not in a financial position to pay the said sum" he therefore "wished to apply to the Bank for a term loan of RM100,000 repayable over a period of 5 years ... in order to enable him to utilise the loan for the above purpose".

The issue before the Court was that in order to retrieve the issue document of title from the defendant Bank, the plaintiff had pleaded undue influence on the part of the defendant Bank and that she did not have the benefit of separate and independent advice. The plaintiff also relied on the concept of "inequality of bargaining power" by reason of the fact that Mr. Andrew Wong (DW2) was not acting for the plaintiff (PW1) and her son-in-law (PW2).

Held:

[1] From the evidence this Court is satisfied that Mr. Andrew Wong was not acting for PW1 and PW2 and that the concept of inequality of bargaining power can be supported.

[2] More importantly, how could DW2 be the legal adviser for PW2 when PD-01 was also an application for a loan from the defendant bank which was and still is legally prohibited from granting it. (See s. 26A of the Banking Act 1973). In fact no loan was ever approved or even considered. On the contrary PW2 could not even resign. He was dismissed. PD-01 was a sham.

[3] In the present case, there is no loan and therefore no liability and there is not even a charge registered, the defendant bank has no right whatsoever legal or equitable to retain the issue document of title which is still in its possession.

[Order that the defendant Bank return the issue document of title to plaintiff.]

a Case referred to:

Lloyd's Bank Ltd. v. Bundy [1975] 1 QB 326 (*foll*)

Legislation referred to:

Banking Act 1973, s. 26A

Contracts Act 1950, s. 24

National Land Code 1965, ss. 242, 244, 323(1)(a)

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For the plaintiff - S. Sivasubramaniam; M/s. Siva, Ram & Associates

For the defendant - Chin Yew Meng; M/s. Allen & Gledhill

JUDGMENT**Lamin Yunus J:****c**

The plaintiff (PW1) in this case is claiming for the return of the issue document of title to her land held under H.S. (M) 5653 P.T. 5733 Mukim Kuala Kuantan which she is alleging to have been wrongfully detained by the defendant. On 17 May 1983 she delivered to the defendant the said issue document of title for the purpose of creating a third-party charge in favour of the defendant as security for a purported loan of RM100,000 from the defendant to the plaintiff's son-in-law (PW2).

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According to PW2, he was employed by the defendant in 1974 as an assistant cashier cum clerk at the Kuantan Branch of the bank. On 16 May 1983, PW2 signed a letter (PD-01) addressed to the Manager (DW1) of the defendant's branch in Kuantan. In evidence PW2 said that the letter was written by Mr. Andrew Wong (DW2) and he (PW2) then, on the advice of DW2 typed it after which he signed it. In that letter he confessed to have paid out on two telegraphic transfers of RM50,000 each which were "not genuinely authorised by that relevant officer of the bank." The letter also states that the "total sum of RM100,000 was paid by me as a result of my own personal negligence," and he "agrees and undertakes to refund to the bank" the whole amount. The letter goes on to state that as PW2 was then "not in a financial position to pay the said sum" he therefore "wishes to apply to the bank for a term loan of RM100,000 repayable over a period of 5 years ... in order to enable me to utilise the loan for the above purpose".

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Now let us examine the evidence of the defendant's branch manager (DW1) and that of the defendant's solicitor, Mr. Andrew Wong (DW2). In examination-in-chief, DW1 said that he did ask PW2 whether he had taken any money by forging the vouchers. PW2 "persistently refused to admit that he had misappropriated the fund. But he admitted that there are certain negligence committed by him ..." DW1 went on to say that the discussion after that centred around as to how to reimburse the bank for the loss. According to DW1, PW2 said that he did not have RM100,000 to repay the bank but he would agree to charge certain property to the bank to raise the sum required. So DW1 said that "to put things on a formal footing it was required that the arrangement to reimburse or charge the properties must be stated in black and white. PW2 said he required legal assistance to put the arrangement in writing. But he did not know any lawyer that can handle this case discreetly for him. At the same time he could **protect his interest** in the writing ..." of it. So DW1 said that "PW2 and I agreed that Mr. Andrew Wong was to act for him in putting the arrangement in black and white." Mr. Andrew Wong was called over. After DW1 had briefed him about the case, DW1 told him that in drafting the letter, he was acting for PW2. So he left both of them alone to discuss the draft and after that PW2 typed it himself. After signing it, he handed it to DW1 on the same day.

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In cross examination, DW1 agreed that in 1983 he knew that the bank could grant any advance, loan or credit facilities to its own employees. But it could grant loans as provided in the scheme of service. DW1 also said that it could also grant loans on “special or compassionate grounds” not exceeding 6 months remuneration of that employee. According to DW1, PW2’s salary then was in the region of RM600 per month. DW1 admitted that at the time when PD-01 was written the bank was prohibited from giving loans to its employees including PW2 if they were still in the service. DW1 further admitted in cross-examination that while PD-01 was being proposed, he did not promise PW2 that he would try his best to arrange with the management as follows:

- a) that he (PW2) be permitted to take a loan from the bank in order to make good the loss;
- b) that he would not be dismissed and no police report be lodged against him and
- c) he could leave the service of the bank freely and voluntarily.

But the management did not agree to the above proposals and that it took the view that serious crimes must be reported to the police. DW1 agreed that there were two options open in order to recover the loss. One - to sue PW2 for negligence and to claim damages. Two - the bank to grant him a loan to which would be utilised to repay the bank for the loss and the bank was to accept a charge to secure the loan. Instead the bank took a disciplinary action against PW2 and summarily dismissed him (See PD-11 and PD-12). DW1 admitted that no loan had been granted to PW2. But the issue document of title is still with the bank and the charge has not been registered until today.

In order to retrieve the issue document of title from the defendant bank, the plaintiff has pleaded undue influence on the part of the defendant bank and that she did not have the benefit of a separate and independent advice. The plaintiff Counsel in his submission placed reliance on the concept of “inequality of bargaining power” by reason of the fact that Mr. Andrew Wong (DW2) was not acting for the plaintiff (PW1) and her son-in-law (PW2). From the evidence I am satisfied that Mr. Andrew Wong was not acting for PW1 and PW2 and that the concept of inequality of bargaining power can be supported. Denning MR as he then was in the case of *Llyods Bank Ltd. v. Bundy* [1975] 1 QB 326 @ 339 enlightened us on the concept thus:

By virtue of it the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefits of the other. When I use the word “undue” I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being “dominated” or “overcome” by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal...

The letter dated 16 May 1983 (PD-1), which was typed and signed by PW2 answers squarely the concept as related above. Having got himself into an unsavoury situation with his employer, the defendant bank, he succumbed to the only solution placed before him that is the letter PD-01 in the words of Denning MR “solely to relieve the straits in which he finds himself.” PW2 said that the letter (PD-01) was written by Mr. Andrew Wong (DW2) and he

- a* was asked by the defendant bank manager (DW1) to type it and then to sign it. He did so for a number of reasons. One reason was that he was introduced to the bank by his uncle, Tan Sri Dato' Thong Yau Hong who also stood surety in the sum of RM20,000. DW1 told him that his uncle being a government servant could not stand surety and if this case came into the open, the government would take action against him and he would lose his pension and gratuity. Another reason was that he was a part-time runner for illegal 4-D lottery. DW1
- b* told him that if he accepted negligence he would not inform the police of his illegal activity. Also if he accepted negligence, he was to quit the bank and he could then carry on with his illegal activity full-time and with the money earned he could pay the bank. Those reasons given clearly operated solely against PW2's interest and in favour of the bank's. How could DW2 be said to be acting for PW2. I have not dismissed DW2's explanation in regard to this. DW2 said in evidence that after PD-01 was drafted in his own handwriting, he (DW2)
- c* requested it to be typed by the manager's secretary, but according to DW2, PW2 "not only volunteered but was very insistent that he typed it himself". "Of course he "volunteered" because one can only imagine the embarrassment he was in and the whole episode gave him no option. DW2's answers in cross-examination were pathetic. For example, he said that the reason why he did not witness PW2's signature in PD-01 because it "was not in my mind at all at that time". When he was asked whether he or his firm did send a bill to PW2
- d* for giving advice and the drafting of PD-01, his answer was "No, I have no reason for not doing it." More importantly, how could DW2 be the legal adviser for PW2 when PD-01 was also an application for a loan from the defendant bank which was and still is legally prohibited from granting it. (see s. 26A of the Banking Act 1973). In fact no loan was ever approved or even considered. On the contrary, PW2 could not even resign. He was dismissed. PD-01 was a sham. No sane person can say that it was drafted with legal advice not even with the
- e* view to protect PW2's interest. I do not intend to proceed any further analysing the facts and examining the various documents in order to show that PW2 did not have the benefit of legal advice and that DW2 was not retained by him. DW2 never ceased to be the solicitor for the defendant bank in this whole incident. The evidence is more than ample.

- The short answer to the present suit was in fact given by DW1 himself in his own words at the end of his cross-examination. He said "if there is no loan to be granted there is no security to be provided." From the evidence, it is clear that no loan has been approved by the bank in favour of PW2. In fact under s. 26A of the Banking Act 1973, no loan can be granted to any person for so long as he remains an employee of a bank. Should there be any such loan granted, the loan agreement would be struck down as being void. (s. 24 of the Contracts Act 1950). From the evidence I find that the said landed property was to serve as security charge for the proposed RM100,000 loan and a third party charge was to be registered. Section
- g* 242 of the National Land Code provides that the purpose of a charge is "to secure the repayment of a debt, or the payment of any sum other than a debt." Because there is no loan in existence, no security is therefore required. By virtue of s. 244 of the National Land Code, a chargee is entitled to the custody of the issue document of title "so long as any liability subsists under the charge." In the present case, there is no loan and therefore, the
- h* defendant bank has no right whatsoever legal or equitable to retain the issue document of title which is still in its possession. The defendant entered a private caveat on 19 May 1983 on the strength of the consent given by the plaintiff (PW1) on 17 May 1983 (see PD-02). The proper inquiry here, was the defendant entitled in law to lodge the caveat? The defendant's obvious answer would be that it had already obtained the consent of the proprietor (PW1). Consent alone is not enough. Under the National Land Code, only three
- i* categories of persons may do so (s. 323(1) NLC). To be able to do so, the defendant in our case must fall within the category in sub s. (1)(a). It must show that it is either "claiming

title to, or any registrable interest in, any alienated land...” The bank has no interest whatsoever legal or equitable and therefore the caveat must go. I therefore order the defendant bank to return the issue document of title to PW1 forthwith.

PW2 was summarily dismissed by that bank with effect from 12 October 1983. According to DW1, the bank is still expecting PW2 to take up the loan. Particularly now that PW2 is no more in the employment of the bank, he is under no obligation to apply for the loan in order to make good the loss.

Also found [1992] 2 CLJ 1298

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